IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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No.

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HAROLD SHEPERD, GEORGE LEWIS and
HERMAN BLOOMBERG, *Petitioners,*

v.

PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT

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The petitioners, Harold Sheperd, George Lewis and Herman Bloomberg, pray that a writ of certiorari issue to review the judgments of the Supreme Court of New York, First Department, rendered in these proceedings on March 4, 1965.

### OPINIONS BELOW

No formal opinions were rendered in connection with the petitioners' convictions and the appeals therefrom. After the trials, the New York City Criminal

Court found the petitioner Sheperd "guilty," Tr. 331, and the petitioners Lewis and Bloomberg were likewise found "guilty," Tr. 423. Upon the consolidated appeals, the Appellate Term of the Supreme Court of New York, First Department, ordered that the judgments of conviction be "affirmed." However, Justice Samuel M. Gold filed a dissenting memorandum with respect to petitioner Lewis' conviction under the first count of the information against him. The consolidated order of affirmance and the dissenting memorandum appear in Appendix A hereto, p. 1a, *infra*.

Thereafter, on July 1, 1965, Associate Judge Fuld of the New York Court of Appeals denied each petitioner leave to appeal to that court. That order is reproduced in Appendix B hereto, p. 4a, *infra*.

Prior to the trials, the petitioners timely moved to suppress evidence that had been seized by police officers. These motions were consolidated with those of other defendants and the motions were partially denied by Justice William E. Ringel with opinion. *People* v. *Reshes, et al*, 39 Misc. 2d 723; Tr. 235. This opinion appears in Appendix C hereto, p. 5a, *infra*.

## JURISDICTION

The petitioner Sheperd, together with a co-defendant (Irving Schiff), was tried and convicted by three judges of the New York City Criminal Court on a four-count information charging violations of § 1141 of the New York Penal Law. The trial took place on October 21-22, 1963 (Tr. 246-336). The petitioner Sheperd was adjudged "guilty" on October 22, 1963, on one of the counts (Tr. 335, 529); on December 11, 1963, he was sentenced to imprisonment in the New

York City Workhouse for a period of 30 days (Tr. 529).

The petitioners Lewis and Bloomberg were jointly tried and convicted by three judges of the New York City Criminal Court on a joint three-count information charging violations of § 1141 of the New York Penal Law. Their trial took place on October 1, 1963 (Tr. 398-423) and the adjudication of guilt was rendered on the same day. Judgments of conviction were entered on November 18, 1963. Petitioner Lewis, convicted on three counts, was sentenced on the first count to 60 days imprisonment in the New York City Workhouse, plus a fine of $500 or an alternative additional 30 days imprisonment; sentence was suspended on the other two counts. Tr. 550. Petitioner Bloomberg was sentenced to the same period of imprisonment and fined in the same amount on one count, receiving a suspended sentence on an additional count. Tr. 550.

All of these convictions were affirmed on a consolidated appeal by the Appellate Term of the Supreme Court of New York, First Department, on March 4, 1965. Thereafter, on July 1, 1965, timely applications by the petitioners for leave to appeal to the Court of Appeals of New York were denied by Associate Judge Fuld. This petition for a writ of certiorari is filed within 90 days following that denial.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

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[1] On July 24, 1965, Mr. Justice Harlan ordered that the execution and enforcement of the judgments of conviction be stayed pending final action by this Court on this petition for writ of certiorari, conditioned upon the posting of specified bail bonds by each petitioner.

## QUESTIONS PRESENTED

1. Whether the proscription in § 1141 of the New York Penal Law of the sale of "sadistic" or "masochistic" books, magazines or other writing is so vague and indefinite as to preclude under the Due Process Clause of the Fourteenth Amendment a state court conviction for having possessed, sold or permitted the sale of such characterized material.

2. Whether the paperback books and magazines here involved can be considered obscene, independently of their characterization as "sadistic" or "masochistic," under any definition of obscenity permitted by the Due Process Clause of the Fourteenth Amendment.

3. Whether a state court conviction of a manager of a book store for the misdemeanor of having permitted the sale of an "obscene," "sadistic" or "masochistic" book, or the conviction of book store clerks for the misdemeanor of having sold such books, can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a trial and a determination by a jury of the alleged obscene, sadistic or masochistic nature of the book.

4. Whether a state court conviction of a manager or clerk of a book store for having sold or permitted the sale of an "obscene," "sadistic" or "masochistic" book can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of allegation in the information as to knowledge or scienter as to the character of the book sold and in the absence of any direct proof thereof or any definitive standard as to the degree of proof required.

5. Whether convictions under § 1141 of the New York Penal Law, predicated upon evidence obtained pursuant to a procedural scheme whereby massive searches and seizures were made of alleged obscene publications in book stores without prior judicial authorization, can be sustained under the Due Process Clause of the Fourteenth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States, Amendment I:**

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

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**Constitution of the United States, Amendment IV:**

> The right of the People to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Constitution of the United States, Amendment XIV, Section 1:**

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

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**New York Penal Law, Section 1141:**

§ 1141. Obscene Prints and Articles

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or

has in his possession with intent to sell, lend, distribute, give away, show or transmute, * * * or otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, * * * writing, drawing, photograph, motion picture film, figure, image, * * *

2. In any manner hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor * * *.

**New York City Criminal Court Act.
Vol. 29A, Part 3, McKinney's
Consolidated Laws of New York:**

§ 31. Jurisdiction

The court and the judges thereof, except as otherwise provided in this act, shall have jurisdiction with respect to crimes and offenses committed within the city of New York, as follows:

(1.) To hear, try, and determine all charges of misdemeanors, except charges of libel: * * *

* * * *

§ 32. Removal of misdemeanor cases

The court, however, shall be divested of jurisdiction to proceed with the hearing, trial, and determination of any charge of misdemeanor in either of the following cases:

(a) if before the commencement of such trial a grand jury shall present an indictment against the same person for the same offense; or

(b) if before the commencement of such trial a judge or justice of a court having jurisdiction to try indictments within the judicial department where the trial would be had shall certify that it is

reasonable that such charge of misdemeanor shall be prosecuted by indictment. . . .

* * * *

§ 40. Mode of Trial

All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided, however, that where the defendant has been charged with a misdemeanor, other than a charge of misdemeanor under article eighty-eight of the penal law, entitled "gambling," the procedure following arraignment shall be as follows:

(1) The defendant shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof:

(2) The defendant may at any time before the court hears any testimony upon the trial demand to be tried in such part, or the district attorney or the legal representative of a department of the state or city in charge of the prosecution, at any time before the court hears any witness to give evidence upon the trial, may demand that the trial be held in such part, or the court may, on its own motion, before any witness is heard to give evidence upon the trial, direct that the trial be held in such part; * * *

* * * *

§ 42. The panel of three judges; informations.

(1) Where the defendant has been held to answer for trial in a part of the court held by a panel of three of the judges thereof as provided in section forty of this act, * * * the action must be prosecuted by information made by the district attorney. The information shall be signed by the district attorney of the county wherein the action was begun and may be substantially in the following form: * * *

## STATEMENT

This case involves three of the various individuals arrested on April 10, 1963, in co-ordinated raids on 21 separately owned bookstores in the Times Square area by New York City police. They were all charged, under § 1141 of the New York Penal Law, with having committed misdemeanors in that they sold or offered for sale certain allegedly obscene publications, described as "sadistic" and "masochistic" in nature.

Certain defendants, including the petitioners, moved to suppress as evidence the various publications which had been seized by the police officers at the time of the arrests. These motions were consolidated for hearing "since the fact patterns of each individual arrest are basically similar and the minor variances are without legal significance for the purpose of these motions." Tr. 235. After a full hearing, the motions to suppress were denied with respect to all exhibits actually purchased by the police officers and granted with respect to the other exhibits that had been seized. *People* v. *Reshes,* 39 Misc. 2d 723; Tr. 235-242. This decision was dispositive of all the motions "in accordance with the agreement of all the parties." Tr. 235.

Thereafter the individual defendants were brought to trial separately or with certain co-defendants. The consolidated appeal involved in the instant case grew out of six of these trials, including those of the three petitioners herein. All of the defendants involved in that appeal, including the petitioners, were tried and convicted by three judges of the New York City Criminal Court following the denial of requests for jury trials.

The relevant proceedings can be summarized more particularly as follows:

### A. The Suppression Hearing

At the consolidated hearing on the various motions to suppress the evidence seized at the time of the arrests, it was established that on April 10, 1963, about 50 policemen assembled at the 24th Precinct of the New York City Police Department to attend a special briefing conference. Tr. 106. They there received instructions from police hierarchy as to the planned raids on the bookstores and the procedures they were to pursue *in order to avoid the necessity of obtaining search warrants in the course of the coordinated raids.*

Lt. Sullivan, who was present at this conference as the representative of the Police Department Legal Bureau, testified that there was a plan for dispersement of the policemen in teams among approximately 21 bookstores in the Borough of Manhattan for the purpose of purchasing allegedly obscene material, making arrests and then conducting searches of the premises and seizing other allegedly obscene materials. Tr. 107, 110-116. Photographs of nude, semi-nude and partially dressed women were displayed to these policemen but not prototypes were given them. They were given a list of books and instructed regarding the "bondage" type of book. They were told to observe whether or not such books were being sold in the stores they were assigned to raid. Tr. 110-112.[2]

Lt. Sullivan further testified that the patrolmen, according to the plan, were to purchase photographs and then, if possible, attempt to purchase "bondage" books. Tr. 112. If they were successful in making such purchases, they were then—and only then—au-

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[2] The State never produced a copy of this book list at the hearing. Lt. Sullivan had seen the list but did not have one in his possession. The lists that were distributed at the conference were all returned to those in charge.

thorized to make an arrest, "search the premises, and if they found specific types of books, they were to seize them." Tr. 116, 159, 160. But if they were unable to make a purchase of photographs or books, the patrolmen were to take no further action; they were instructed "to leave the store and call a phone number that was given to them." Tr. 159-160.

Ptl. Klotzsche, who had arrested the defendant Reshes, testified that he had attended the briefing conference and that he made the arrest in accordance with the foregoing instructions. He had been directed to go to the bookstore in question and take "appropriate action" if he observed anything of a pornographic or obscene nature for sale. Tr. 46. After being shown photographs and books and given a list of titles of books, he was told that such was "the type of stuff that we want you to look for." Tr. 47. As to the books on the list, he was "to look for that specific book before an arrest to see if it was displayed, but after an arrest to seize all obscene photos or books that were there. There weren't any definite names given as to that—anything the we deemed to be of that nature." Tr. 51. Ptl. Gunson, who arrested the petitioner Sheperd's co-defendant, gave similar testimony. Tr. 186-187.

The raids were coordinated and occurred simultaneously at 6:00 p.m. on April 10, 1963. At that hour, Ptl. Klotzsche entered the premises at 584 Seventh Avenue and purchased a set of pictures from the defendant Resches. He then placed Resches under arrest. Tr. 56. Ptl. Klotzsche and his partner then closed the store and conducted a search of the premises. Tr. 62. This search lasted from an hour to two hours. Tr. 65. They seized pictures, books and films sufficient to require 3 cartons for packing. Tr. 164-166. Some 340

books, with at least 75 different titles, were seized. Tr. 166. None of these books were on the list furnished the police. Tr. 65. In seizing these books, Ptl. Klotzsche exercised his "own opinion as to whether or not they were obscene and should be seized." Tr. 33. This opinion was formed by "glancing through them," by looking at "a passage, and if it seemed to me to be obscene" he would seize the book. Tr. 33-34. Not all the books he examined were seized.

Ptl. Gunson engaged in a similar raid at the same time at 598 Seventh Avenue. He there purchased three items from petitioner Sheperd's co-defendant, one Irving Schiff. Tr. 172. Both Sheperd and Schiff were placed under arrest, the store was closed and a search and seizure ensued that lasted at least one hour. Tr. 173-178. During that hour Ptl. Gunson seized 499 magazines, books and pamphlets, including approximately 100 differently entitled books. Tr. 195, 204-205. Only 15 to 20 titles had appeard on the list given to Ptl. Gunson. Tr. 204. The seizures were made pursuant to his independent judgment as to the obscenity of the books and in accordance with his instructions. Tr. 203. The seizures were made from open racks, shelves, storage drawers and a safe in a hall adjacent to the store. Tr. 213-215.

At the conclusion of the hearing there was agreement between the court, defense counsel and the District Attorney that all the evidence obtained by seizure *subsequent* to the arrests should be suppressed. Tr. 236-237.[2] The court then ruled that the material that

[2] As a result, the court directed that the 499 magazines, books and pamphlets, seized after the arrests of petitioner Sheperd and his co-defendant, be returned. Tr. 243-245. The hundreds of publications seized after the arrests of petitioners Lewis and Bloomberg were likewise ordered returned. Tr. 243-245.

was purchased by the officers *prior* to the arrests, having been openly displayed for sale, should not be suppressed. Tr. 235-242; see Appendix C hereto. It was held that these purchased materials had not been illegally seized and that no search warrant was required where entry was made into premises open to the public and contraband was therein purchased. The court thus answered in the negative the critical question whether evidence acquired by purchase prior to arrest is required to be suppressed as an indivisible segment of a comprehensive search and seizure plan, conducted without any judicial warrant.

### B. The Sheperd Trial

Petitioner Sheperd, together with his co-defendant Schiff, were tried on a three-count information charging them with having sold a certain set of allegedly obscene, sadistic and masochistic pictures and two similarly described books entitled "Promenade Bondage" and "Spanking Nurses." The information was amended at the trial to include a fourth count, alleging that Sheperd "did unlawfully permit and allow the sale of certain obscene, . . . sadistic, masochistic books and pictures" as specified in the other counts.[4] Tr. 15.

Following denial of motions for a jury trial, the trial took place before a three-judge court pursuant to the requirements of §§ 31 and 40 of the New York City Criminal Court Act. The sole testimony presented by the prosecution was that of Harvey Gunson, the arresting detective. He stated that he entered the

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[4] The fourth count thus charged a violation of clause 2 of § 1141, relating to employing, using or permitting any person to sell an obscene, sadistic or masochistic book in violation of clause 1 of § 1141.

bookstore at 598 Seventh Avenue at 6:00 p.m. on April 10, 1963, together with his partner, Detective Casoveri. He noted that the store was ringed with shelves of books and pictures, with a counter on the left and racks in the center of the store filled with books. Tr. 261. His testimony as to the purchase, sale and arrest was as follows:

> Q. Now, what did you do after you entered the store?
>
> A. I perused the shelves, made observation of the defendants, and finally selected certain books from the shelves which I took to the defendants at the counter. I also—
>
> Q. There are two defendants in this case. To which defendant did you bring these particular books?
>
> A. I brought my books over to the defendant Schiff.
>
> Q. What did you do when you arrived at the counter?
>
> A. I put the books down at the counter and I gestured at a booklet of pictures that was pinned to the wall behind the counter, indicating that I would like to purchase one of those booklets also." [Tr. 264-265.]
>
> * * * * * * * * *
>
> Q. And would you just state again to the Court what happened with these particular books at the time you brought them to the cash register?
>
> A. I just placed them in front of the defendant Schiff and indicated I was going to purchase them. I said, "I want these," and then I began talking to him about the picture pinned on the wall behind him, and eventually the purchase of the three items was made.
>
> Q. More specifically, what did he do with those two books you have here in Court?

A. He put them in a bag along with the booklet of pictures. [Tr. 270-271.]

* * * * * * * * *

Q. At the time you made the purchase, officer, of People's Exhibits 1, 2 and 3, do you recall where the defendant Sheperd was with respect to the cash register and the point of sale?

A. I believe he was standing next to the defendant Schiff, further to the rear of the store, if I remember correctly.

Q. Behind the same counter?

A. Behind the same counter.

Q. All right. What did you do at the time when you made the purchases which you just described? After completing the purchase what did you do?

A. I identified myself to the defendants and placed Schiff under arrest.

Q. Who arrested the defendant Sheperd?

A. My partner.

Q. What is his name?

A. Detective Casaveri.

Q. Were you present and did you assist in that arrest?

A. Yes.

Q. Was there a conversation had with the defendant Sheperd in your presence after he was placed under arrest?

A. Yes.

Q. State to th Court what that conversation was and who were the participants?

A. My partner, Detective Casaveri, in my presence questioned him. He was asked what his capacity in the store was, and he stated he was the manager and that the ownership of the store was a corporation.

Q. Was there any further conversation with either of the defendants other than that to which you have testified?

A. Nothing further. [Tr. 273-284.]

The pictures and books which the officers had purchased were then introduced as exhibits. No testimony was introduced on behalf of the defendants. The three judges thereupon found the co-defendant Schiff guilty under the second count of the information for having sold the book entitled "Bondage Promenade." Tr. 335. The petitioner Sheperd was found guilty under the fourth count for having permitted the sale of that book. Tr. 335. Judge Gassman noted for himself that, as a basis for the convictions, he found the book to be obscene "in that it is sadistic and masochistic." Tr. 332. The other two judges stated they preferred to make no "further elucidation" as to the grounds of their decision. Tr. 332.

### C. The Lewis-Bloomberg Trial

The petitioners Lewis and Bloomberg were jointly tried and convicted by three judges on a joint three-count information charging that they sold, in violation of § 1141, certain photographs, a book entitled "Spanking Sisters," and a book entitled "Bondage." All were described as obscene, lewd, sadistic and masochistic. Tr. 18.

Following the denial of preliminary motions, including a demand for a jury trial (Tr. 402), the prosecution's sole witness—Detective Alvin Jones—gave the following account of his entry into the bookstore at 254 West 42nd Street at about 6:00 p.m. on April 10, 1963:

> Q. At the time you entered, what did you do?
>
> A. I entered. I looked around the premises and I noticed a wooden rack of photographs of women in various stages of undress next to the cash register in the front of the store.
>
> Q. In what manner were these articles packaged?

A. They were in a cellophane wrapper. [Tr. 407-408.]

* * * * * * * * *

Q. Approximately how many were there?

A. At the time I thought there were ten or twelve in the package.

Q. How many packs would you say you saw in that rack?

A. Approximately three hundred.

Q. Now did you see either of the Defendants in the store that day?

* * * * * * * * *

A. I saw both Defendants at various times on the floor of the store and on occasion both of them would handle the cash at the cash register.

Q. How much time did you remain in the store before making any purchases yourself?

A. Approximately fifteen minutes.

Q. During the course of that period of time did you see others in the store?

A. Yes, sir.

* * * * * * * * *

Q. Did you see any of these individuals do anything other than looking?

A. Yes, I saw some individuals purchase books.

Q. Can you describe what it is you saw them do?

A. They would pick up a book from the shelf. They would speak to either Mr. Bloomberg or Mr. Lewis and then they would proceed to the cash register, make their purchase, their purchase would be placed in a paper bag, and they would walk out.

Q. Did there come a time when you removed certain pictures from this rack?

A. Yes.

Q. How many packages did you remove?

A. I removed two packages of pictures from the rack.

Q. What did you do with the packages that you removed?

A. I presented them to the Defendant Lewis who was standing behind the cash register at the time. I asked him if these were the only photos he had, and he said, "They are all the same, man." [Tr. 408-411.]

* * * * * * * * *

Q. Detective, what happened after you made the purchase of People's Exhibit No. 1? [The two packages of photographs.]

A. I continued to look around the store and from the book shelf.

Q. Had you yet identified yourself as a police officer?

A. No, I did not. . . . I then removed from a shelf two books titled "Spanking Sisters" and "Bondage", and I went to the Defendant Bloomberg and I asked, "Are these books any good?" And he said, "Well, I have got some better if you can read French." And I said I couldn't read French but I will take these, and I asked him the price, and he said, "Well, you can have both of them for five dollars."

Q. What did you do at that point?

A. I then took the books to the Defendant Lewis who was at the cash register and the Defendant Bloomberg called over to the Defendant Lewis and said, "Give them to him for $2.50 each," and I purchased the books then, and I then identified myself . . . and placed them both under arrest. [Tr. 414-416.]

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[The books "Bondage" and "Spanking Sisters" were here received in evidence as People's Exhibits No. 2 and 3.]

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Q. Approximately how many books were in the store?

A. Five thousand books.

Q. Can you estimate approximately how many different titles?

A. Hundreds of titles.

Q. Now with respect to People's Exhibit No. 1, did you make your own selection?

A. I did.

Q. Now, at the time you made your own selection could you see anything more than the view on the front or rear picture of the packets?

A. No

Q. After you made the purchase of People's Exhibit No. 1 you continued to browse around?

A. Yes

Q. Did you take out the pictures and examine them while you were in the store?

A. I did. [Tr. 419-420.]

No further testimony or evidence was introduced by either the prosecution or the defense. At the conclusion of the trial, the three judges found the petitioner Lewis guilty on all three counts and the petitioner Bloomberg guilty on the second and third counts.

## RAISING THE FEDERAL QUESTIONS

*New York City Criminal Court.* At the outset of both trials, defense counsel moved for a jury trial in accordance with the provisions of § 32 of the New York City Criminal Court Act. Tr. 251, 402. General objection was made that the failure of that Act to require a jury trial was repugnant to the Fourteenth Amendment; the specific objection was that a non-jury trial for a violation of § 1141 was violative of the First, Sixth and Fourteenth Amendments of the Federal Constitution in view of the constitutional standard of obscenity enunciated in *Roth* v. *United States,* 354 U.S. 476, 489, "whether to the average person, applying contemporary community standards, the dominant

theme of the material taken as a whole appeals to prurient interest". Tr. 256, 402. Motions were also made to dismiss each count of the informations on the ground that § 1141 of the Penal Law was violative of the First and Fourteenth Amendments and was constitutionally defective since it was vague and indefinite with respect to describing the crime of selling or permitting the sale of sadistic and masochistic material. Tr. 258-259. Counsel further moved to dismiss the informations on the ground that, in violation of the Fourteenth Amendment, the informations filed under § 1141 failed to charge and the evidence failed to show that the petitioners knowingly sold or permitted to be sold material of an obscene, sadistic or masochistic nature. Tr. 259, 327-328, 403-404, 422.

*The Appellate Term.* On the consolidated appeals from the convictions, petitioners' briefs to the Appellate Term contended *inter alia* that (1) the terms "sadism" and "masochism," as used in § 1141, are vague and indefinite and render § 1141 invalid in those respects under the Due Process Clause of the Fourteenth Amendment; (2) the petitioners had an absolute right under the Due Process Clause of the Fourteenth Amendment to a jury trial, even for a misdemeanor charge, as to the alleged obscenity of material sold to the public; (3) the order denying petitioners' motions to suppress the evidence upon which they were convicted was violative of their rights under the Due Process Clause of the Fourteenth Amendment as well as under the Fourth Amendment; and (4) the failure to require, allege or prove scienter with respect to the sale of allegedly obscene, sadistic or masochistic was violative of petitioners' rights under the Due Process Clause of the Fourteenth Amendment.

*Motions for leave to appeal.* As indicated in Judge Fuld's order denying petitioners leave to appeal to the New York Court of Appeals, petitioners there reiterated their claims that (1) they were deprived of a jury trial in violation of the First and Fourteenth Amendments, (2) their convictions were predicated upon evidence procured by unreasonable searches and seizures in violation of their rights under the Fourth and Fourteenth Amendments; (3) the publications upon which their convictions were predicated were not "obscene" under any constitutionally permitted definition of that term; (4) § 1141 of the Penal Law, in its proscriptions as to sadistic and masochistic books, is vague and indefinite and violative of the First and Fourteenth Amendments; and (5) their convictions were without proof that the petitioners knew of the obscene nature and character of the publications, in violation of the First and Fourteenth Amendments. See Appendix B hereto.

## REASONS FOR GRANTING THE WRIT

### 1. Two of the Questions in This Case Are To Be Considered by This Court in Mishkin v. New York, No. 49, Oct. Term 1965—i.e., the Constitutional Validity of § 1141 of the New York Penal Law and the Obscenity of the Type of Materials Here Involved

Probable jurisdiction was noted last term in *Mishkin* v. *New York,* No. 49, Oct. Term 1965, and that case is now awaiting oral argument and resolution by this Court. Two of the issues presented by this petition are identical in nature to certain of the questions presented in *Mishkin*: (1) whether § 1141 of the New York Penal Law, in its definition and proscription of "sadistic" and "masochistic" publications, is void under the Due Process Clause of the Fourteenth

Amendment for vagueness and indefiniteness, and (2) whether the so-called sadistic, masochistic or bondage publications here involved can be considered obscene under any definition permitted by the Due Process Clause of the Fourteenth Amendment.

These same two questions are also posed by the petition filed and pending in *Friedman* v. *New York*, No. 135, Oct. Term 1965. In that case, the petition and the memorandum of the District Attorney for New York County suggested that the Court might desire to withhold action on the petition until final resolution of the *Mishkin* case.[5]

The grant of review in the *Mishkin* case fully demonstrates the importance and substantiality of these constitutional questions and further elaboration here is unnecessary. See also *United States* v. *Klaw*, — F. 2d — (C.A. 2, July 15, 1965), reversing a federal court conviction for mailing so-called bondage books for failure to prove that the prurient interest of either the average man or a particular class was appealed to by such material.

As in the *Friedman* case, it would be appropriate to withhold action on this petition until the *Mishkin* case is adjudicated by this Court. But, as in *Friedman*, there are other questions here involved which are not presented in *Mishkin* and which deserve plenary consideration by this Court even if the judgment in *Mishkin* be affirmed.

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[5] The *Friedman* case, like the instant one, presents these constitutional issues from the standpoint of the bookseller, whereas the appellant in *Mishkin* is primarily a publisher and secondarily a bookseller. For that reason, this Court might want to consider the constitutional problems in terms of a bookseller alone and thus hear argument in the *Friedman* case and/or in this case.

**2. The Question Whether There Is an Absolute Federal Constitutional Right To Have a Jury Determine the Issue of Obscenity in the Light of Community Standards Is Both Substantial and Unresolved**

This case puts in sharp focus an important and unresolved question under the Due Process Clause of the Fourteenth Amendment. Is there a due process right to a jury trial in a misdmeanor prosecution where the basic issue to be resolved is the obscenity of a publication? That question is not asked or involved in the *Mishkin* case; but it is one of the questions presented in the *Friedman* petition.

Under the New York City Criminal Court Act, the petitioners were precluded from obtaining a jury trial on the obscenity issues raised in the misdemeanor informations filed against them. Section 40 of that Act provides that all misdemeanor trials in the New York City Criminal Court "shall be without a jury," being heard instead by either one or three judges. While Section 32 authorizes a New York Supreme Court judge in his discretion to certify that the misdemeanor charge should be prosecuted by indictment, in which event a jury trial ensues, the defendant has no absolute right to such a jury determination. The petitioners here, of course, made express and timely demands for the exercise of such discretion so that they might obtain a jury trial, but their motions were all denied. Those denials, being of a discretionary nature, were non-appealable under New York law. *People* v. *Brownstein*, 11 App. Div. 2d 3 (1st Dept.). They were thus forced to proceed to trial before three judges pursuant to the New York rule that "There is no constitutional right to a jury trial in misdemeanor cases (Constitution of the State of New York, Article VI, § 18)"—which constitutional provision permits

misdemeanor trials "without a jury." *Tenney* v. *Liberty News Distributors, Inc.*, 13 App. Div. 2d 769.[6]

The substantiality of the federal constitutional right herein claimed is at once apparent. By admitted dicta, this Court once indicated that there is no such right to a jury in misdemeanor cases. Referring to the precise statutory scheme here involved, the Court in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 443, stated that a defendant charged with an obscenity misdemeanor in New York "is not thereby entitled to a jury trial," although "a jury may as a matter of discretion be summoned." The statement was then made that "Of course, the Due Process Clause does not subject the States to the necessity of having a trial by jury in misdemeanor prosecutions." 354 U.S. at 444.

But the precedential value of that statement is not only questionable but has in fact been questioned by Justices of this Court. The *Kingsley* case itself was not a criminal misdemeanor case; rather it was a civil or equitable proceeding.[7] And the Court's opinion conceded, 354 U.S. at 443-444, that the appellants there, "as a matter of fact, did not request a jury trial, they did not attack the statute in the courts below for failure to require a jury, and they did not bring that

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[6] But this statement in the *Tenney* case must be deemed dicta in view of the court's acknowledgment that "This is a proceeding in equity" and that "a jury is not ordinarily a part of the judicial tribunal in equity cases," the grant of a jury trial being in the discretion of the chancellor. See also *Bunis* v. *Conway*, 17 App. Div. 2d 207, 210, leave to appeal denied, 12 N.Y. 2d 679.

[7] The *Kingsley* case arose under § 22-a of the New York Code of Criminal Procedure providing for an equity proceeding as a supplement to conventional criminal procedures. Section 430 of the New York Civil Practice Act provides for discretionary jury trials in equity proceedings.

issue to this Court." Hence the statement as to the absence of a federal constitutional right to jury trial in a misdemeanor setting must be viewed as a gratuitous dictum.

More importantly, the applicability of that dictum to obscenity prosecutions has been seriously questioned by members of this Court. Concededly, states may not be obliged by the Due Process Clause to provide jury trials in ordinary misdemeanor prosecutions. But when such a prosecution necessarily concerns a determination and application of the constitutional and community standards respecting obscenity, trenching as they do upon fundamental principles of free speech and press, an exception to the general rule may be required by the Due Process Clause.

Mr. Justice Brennan, dissenting in the *Kingsley* case, 354 U.S. at 447-448, stated his belief that even under New York equity procedures, where discretionary jury trials are possible, the absence of an absolute right to a jury trial in an obscenity case was "a fatal defect." After noting that both the *Roth* and *Albert* cases, 354 U.S. 476, involved criminal obscenity statutes allowing a jury trial as of right, Mr. Justice Brennan stated (p. 448):

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the

> standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, *i.e.*, that reasonable men may differ whether the material is obscene.

Mr. Chief Justice Warren later expressed his accord with these views in his dissent in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 68-69, stating that "The inexistence of a jury to determine contemporary community standards is a vital flaw."

Neither *Kingsley Books* nor *Times Film* involved criminal proceedings in which the jury question was put in issue before this Court and the decisions in those cases cannot be considered dispositive of the issue. And in *Jacobellis* v. *Ohio,* 378 U.S. 184, a criminal obscenity case lacking a majority opinion, the issue was raised by several Justices but not resolved by the Court; thus in his dissent in *Jacobellis,* 378 U.S. at 201, Mr. Chief Justice Warren, joined by Mr. Justice Clark, reiterated his belief that:

> Finally, material which is in fact obscene under the *Roth* test may be proscribed in a number of ways—for instance, by confiscation of the material or by prosecution of those who disseminate it—provided always that the proscription, whatever it may be, is imposed in accordance with constitutional standards. ***If the proceeding involved is criminal, there must be a right to a jury trial, a right to counsel, and all the other safeguards necessary to assure due process of law.*** [Emphasis added.]

The time has now come for this Court to resolve this substantial and important constitutional question. The

issue was properly raised below and the denial of the right to a jury trial on the obscenity charge was complete. The issue, moreover, is a recurring one, as witnessed by the presence of the issue in *Jacobellis* and in *Friedman* v. *New York,* No. 135, Oct. Term 1965. The many state courts, dealing with increasing numbers of obscenity prosecutions (many of them in the misdemeanor category), need guidance on this vital problem, particularly in light of the divergent but non-definitive views expressed within this Court.

The appropriateness of granting review of this issue is in no way decreased by the fact that an obscenity determination is ultimately a matter of constitutional law reviewable by appellate courts and by this Court. The emergence of a constitutional fact in any given case does not operate to destroy any right to a trial by jury or to merge the functions of a jury with those of a trial or appellate judge. The appellate determination of constitutional facts is simply the final assurance that constitutional rights have been properly observed in the case. But if there be any lingering doubts on this score, as the memorandum of the District Attorney suggests in *Friedman* v. *New York,* No. 135, Oct. Term 1965, the need and the appropriateness of clarification by this Court are augmented.

**3. This Case Raises the Important Question Reserved in Smith v. California, 361 U.S. 147, as to the Sort of Mental Element Requisite to a Constitutionally Permissible Prosecution of a Bookseller for Possessing or Selling an Obscene Book**

While § 1141 of the New York Penal Law does not in terms specify knowledge, intent or scienter as an ingredient of the crime of selling or permitting the

sale of obscene matters,[8] the New York Court of Appeals has construed the statute as being "instinct with the idea of scienter" and has ruled that a conviction "cannot be upheld without proof of the element in question which we find required by section 1141." *People* v. *Finkelstein,* 9 N.Y. 2d 342, 344-345.

Thus § 1141 by interpretation meets the basic rule enunciated by this Court in *Smith* v. *California,* 361 U.S. 147, 155, that "all mental elements" cannot constitutionally be removed from the crime of possessing or selling obscene material. But expressly left open by the *Smith* decision was the "sort of mental element . . . requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock." 361 U.S. at 154. As stated in Mr. Justice Frankfurter's concurring opinion, 361 U.S. at 161, "Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy

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[8] Section 1141 makes it a crime to sell or possess with intent to sell or to employ or assist another person in selling any obscene, lewd, sadistic or masochistic publication. The court in the *Finkelstein* case conceded that this statute "might possibly be interpreted to exclude scienter" but, "guided by the strong constitutional presumption attending legislative enactments," ruled that the mere omission of the word "scienter" need not be construed as an attempt to eliminate that common-law element of the crime. 9 N.Y. 2d at 344-345. The decision of this Court in *Smith* v. *California,* 361 U.S. 147, was a factor contributing to the interpretation adopted by the New York court.

the how much or the how little, the Court leaves for another day.'"[9]

These proceedings constitute most appropriate vehicles for determining "the how much or the how little" scienter that must be shown to support a constitutionally permissible prosecution of a bookseller. Direct proof of scienter in the trials below was nonexistent. As respects the petitioner Sheperd, the evidence showed no more than the fact that he acknowledged that he was the manager of the bookstore, an acknowledgement made *after* a clerk had been arrested for selling two books to a police officer. Tr. 274. There was no evidence whatever that Sheperd even knew that the transaction had taken place, the arresting officer being uncertain in his recollection as to Sheperd's juxtaposition to the clerk at the time of the sale. Tr. 273. Nor was there any evidence that Sheperd knew or should have known of the alleged nature of the books in question. Sheperd was convicted, in short, solely on the basis of his status as bookstore manager.

The evidence as to scienter on the part of the petitioners Lewis and Bloomberg was likewise deficient. Those two individuals were shown only to have participated, as clerks, in the sale to a police officer of certain books and photographs—which were later

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[9] Mr. Justice Harlan's opinion in *Manual Enterprises* v. *Day*, 370 U.S. 478, 498, noted that "the Court found it unnecessary in *Smith* to delineate the scope of *scienter* which would satisfy the Fourteenth Amendment."

found to be obscene.[10] Not one syllable of testimony indicated that either of them actually knew that the material in question was obscene in nature.

Such convictions, in the absence of evidence as to the vital scienter element of the alleged offenses, raise federal due process problems. See *Thompson* v. *City of Louisville,* 362 U.S. 199; *Garner* v. *Louisiana,* 368 U.S. 157, 163. And the convictions, particularly Sheperd's, constitute a return to the proposition outlawed by the *Smith* decision; absolute liability, eliminating "all mental elements," was imposed on these petitioners.

Due regard must of course be given to what this Court said in *Smith* (p. 154): "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." But an inference of knowledge of a particular book's obscenity must certainly be grounded on

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[10] In addition, petitioner Bloomberg was said to have responded to a question by the officer as to whether the books were "any good" by stating that "I have got some better if you can read French." Tr. 415. Such a flippant statement might support an inference that Bloomberg had read the books but, in the context of an obscenity trial involving serious constitutional considerations, it cannot be taken as proof beyond a reasonable doubt that he knew these books to be obscene.

In *People* v. *Finkelstein,* 11 N.Y. 2d 300, 304, the New York Court of Appeals held that scienter had there been "sufficiently proven beyond a reasonable doubt" since the "voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the cover, the $5 selling price boldly stamped on the front cover of each paper-backed book, taken together, warranted the trial court's conclusion that scienter was established beyond a reasonable doubt." No such totality of facts is present in either of the instant trials.

something more substantial than one's status as a bookstore manager or as a clerk who has sold two out of thousands of books in stock. Is the manager or clerk to be held accountable for the possible obscene nature of each and every book in the store? Is he to engage in a censorship crusade, based on his own untutored standards, before daring to offer books for sale? Just what are the circumstances in which a bookseller must acquaint himself with the contents of a book or explain why he did not?

These are the questions posed by the record in these trials. And these are the questions left open by the *Smith* case. They are questions that must plague all state and federal courts dealing with obscenity prosecutions until authoritative answers are supplied by this Court. For that compelling reason, certiorari should be granted in this case.

These unanswered questions are compounded in this case, moreover, by the fact that the informations filed against the petitioners alleged no more than that they "unlawfully" sold or permitted to be sold the allegedly obscene materials. Tr. 15, 18. While § 1141 has been construed as incorporating the necessary element of scienter, not one reference to that element appeared in the allegations of the informations. This failure to allege scienter or knowledge may alone be sufficient to invalidate the convictions under the Due Process Clause of the Fourteenth Amendment. This Court has consistently ruled, with respect to federal prosecutions, that where scienter is an essential element of a crime it must be alleged in the indictment. *Evans* v. *United States,* 153 U.S. 584, 608; *Bannon* v. *United States,* 156 U.S. 464; *United States* v. *Corbett,* 215 U.S. 233; *United States* v. *Britton,* 107 U.S. 655.

So critical is the element of knowledge in state obscenity prosecutions that the failure to incorporate

that element in an indictment or information may now be said to constitute a due process infirmity. And that failure, in the instant case, may well have contributed to the paucity of evidence as to scienter which the prosecution felt obligated to provide. Thus the totality of the circumstances with respect to the proof of scienter warrants most careful scrutiny by this Court.

**4. The Decision Below, Predicated Upon Evidence Obtained Pursuant to a Procedural Scheme Whereby, Without Prior Judicial Approval, Massive Searches and Seizures Were Made of Allegedly Obscene Publications Conflicts With the Principles Announced by This Court in the Marcus and Kansas Cases**

In *Marcus v. Search Warrant*, 367 U.S. 717, a noncriminal proceeding, this Court unanimously condemned a massive search and seizure of allegedly obscene publications pursuant to general search warrants. Apart from the fact that the bookseller had no opportunity to contest the reasons for the officer's beliefs which underlay the court's issuance of the warrants, the Court emphasized that "the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene"; the warrants gave "the broadest discretion to the executing officers . . . specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene . . . publications.'" 367 U.S. at 731-732. Such a broad procedure, providing no guide to the exercise of informed discretion, was held violative of the Due Process Clause.

The *Marcus* ruling, moreover, expressly rejected the theory of "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes

of search and seizure." The authority given police officers in the *Marcus* case indiscriminately to seize "obscene . . . publications" was held to pose problems "not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' "—problems relating to "the possible consequences for constitutionally protected speech." 367 U.S. at 730-731.

Subsequently, in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, another non-criminal proceeding, this Court reaffirmed the rejection of the contraband theory with respect to books and magazines, Mr. Justice Brennan's opinion stating (378 U.S. at 211-212):

> It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus*.

Thus both *Marcus* and *Kansas* implicitly recognize the inhibitory and inevitable effect of mass procedures which necessarily tend to self-impose censorship and restriction as condemned in *Smith* v. *California*, 361 U.S. 147, 153.

And tested by the foregoing principles, the instant case raises a most serious constitutional issue. *Marcus* differs from the present case only in that an arrest rather than a search warrant preceded the massive search and seizure. But this Court having condemned as violative of the Due Process Clause all searches and seizures under warrants authorizing indiscriminate seizure of allegedly obscene books, how can police officers constitutionally conduct the same type of search and seizure in conjunction with an arrest? Certainly an indiscriminate search and seizure as an incident of an arrest for selling a particular book is

no less inhibitory on legitimate distribution of literature than such search and seizure incident to a general warrant.

In apparent recognition of that inhibitory effect, the courts below sustained the motion to suppress all that was seized *subsequent* to the arrests. See Appendix C hereto. But the books that were actually purchased by the police officers, for which the petitioners were arrested, were admitted into evidence on the theory that they were open contraband. See p. 7a, *infra*. But both *Marcus* and *Kansas* rejected the contraband notion as applied to books and magazines; and that rejection would seem to undermine use of the notion to justify an arrest.[11] And whether the officer's personal judgment as to the obscenity of the books that he purchased constituted probable cause for making the arrest without prior judicial sanction raises serious questions as to the federal constitutional validity of the arrest. See *Beck* v. *Ohio*, 379 U.S. 89, 91. Hastily thumbing through books prior to purchase hardly suffices as probable cause in light of the *Roth* requirement, 354 U.S. at 489, that the material be viewed "taken as a whole."

Moreover, the arrests that took place were but incidental and secondary to the whole pre-arranged scheme for mass searches and seizures—a scheme deliberately

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[11] In *People* v. *Matherson*, .... N.Y. 2d ...., the New York Court of Appeals has held that "The seizure of evidence upon which the conviction is based was an incident to a lawful arrest on sufficient cause in a place open to public access. Therefore, the fact a search warrant was defective, as the People concede, because it was a general warrant (cf. *Marcus* v. *Search Warrant*, 367 U.S. 717, *Stanford* v. *State of Texas*, 379 U.S. 476) did not preclude the reception of evidence seized as an incident to the arrest. No opinion. All concur." See also *People* v. *Peskin*, .... N.Y. 2d ...., to the same effect.

conceived as a springboard for violation of the First, Fourth and Fourteenth Amendments. A question is thus raised as to whether this virus of constitutional invalidity so infected the whole procedure as to make it impossible to separate the incidental purchases and arrests in order to sustain the convictions.[12] The answer to that question involves a choice between a policy which condones and encourages illegality in the pre-trial procedure as a law enforcement expedient and one which insists upon legal methods throughout the procedure. Petitioners suggest that only total condemnation, including condemnation of the convictions arising from the incidental arrests for selling so-called "contraband," can act as a bulwark against erosion of First Amendment liberties.

## CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Counsel for Petitioners*

September 28, 1965.

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[12] An arrest, of course, cannot be made for the purpose of conducting a roving search or as a pretext to search for evidence. *United States* v. *Rabinowitz*, 339 U.S. 56, 62; *United States* v. *Lefkowitz*, 285 U.S. 462, 467. But the pre-arranged scheme envisaged the arrests in this case as the pretext for the massive search and seizure program. The arrests thus cannot be viewed in isolation.

## APPENDIX A

APPELLATE TERM, SUPREME COURT, FIRST DEPARTMENT,
SEPTEMBER 1964

Present: Hon. Samuel H. Hofstadter, J.P.; Hon. George Tilzer, Hon. Samuel M. Gold, Justices.

No. 247

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
IRVING SCHIFF and HAROLD SHEPERD,
*Defendants-Appellants.*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
ISIDORE SEARLES, *Defendant-Appellant.*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
FRITZ WEITMEYER, *Defendant-Appellant.*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
GEORGE LEWIS and HERMAN BLOOMBERG,
*Defendants-Appellants.*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
IRVING SCHIFF, *Defendant-Appellant.*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,
v.
WILLIAM STANTON, *Defendant-Appellant.*

Consolidated appeal by defendants from eight (8) separate judgments of conviction of the Criminal Court of

the City of New York, County of New York, entered separately on November 18, 1963 and December 11, 1963. Each of the defendants was found guilty of violating section 1141 of the Penal Law (Obscene Prints and Books).

PER CURIAM:

The record reveals that defendant Irving Schiff was found guilty on count two and acquitted on counts one and three of the information filed against him. The sentencing court inadvertenly failed to sentence him on count two and instead sentenced him on counts one and three. As to defendant Irving Schiff, the sentence is a nullity.

Judgments of conviction affirmed except as to the judgment of conviction of defendant Irving Schiff under counts one and three only of the 1963 information. Judgment of conviction of defendant Irving Schiff under counts one and three only of the 1963 information vacated and the proceeding is remanded to the court below for sentence under count two of the 1963 information.

I concur. SH

I concur. GT

I dissent as to Appellants Searles and Lewis for reasons stated in accompanying memorandum and hold that the convictions on count one of each information be reversed and a new trial ordered.

SMG

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DISSENTING MEMORANDUM

GOLD, J.:

I concur with the majority as to the validity of the convictions of all defendants on all the charges, and also as to defendants Searles and Lewis, on the charges embraced in count two and counts two and three of their respective informations.

With respect to Searles and Lewis, however, I dissent and vote for reversal and a new trial on count one of each information for the following reasons: The first count of each information charges these defendants with unlawfully selling "a certain obscene, lewd, * * * picture, drawing and photograph * * *." The subject matter of the charge is not otherwise identified or described. At the Searles' trial, there were admitted into evidence three cellophane wrapped packets of photographs. Each packet contained twelve different pictures of girls in a state of undress or partial undress. At the Lewis trial, two other sets of pictures each containing twelve different pictures of girls similarly clad, were admitted into evidence. At no time during the trial of either defendant did the Assistant District Attorney point out to the appellants, or to the court, the particular picture or pictures claimed by him to be the basis of the charge. Furthermore, it does not appear that the trial court identified the picture or pictures found by it to be obscene as the basis for either conviction.

Alleged obscene material must be sufficiently identified either in the information or on the trial (People v. Kofforth, 2 N Y 2d 807; People v. Zucker, 15 A D 2d 883; People v. Grasberg, 13 A D 2d 635). In the case at bar neither practice was adopted.

In my opinion the policy of using printed forms for an information in obscenity cases, without supplemental specifications, is in disregard of the fundamental right of a defendant to be informed with reasonable certainty of the acts constituting the crime of which he was charged. It may lead, as here, to a failure of the People to inform a defendant of the specifications of the charge.

SMG

## APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. STANLEY H. FULD, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

-against-

IRVING SCHIFF, HAROLD SHEPERD, ISIDORE SEARLES, GEORGE LEWIS, HERMAN BLOOMBERG, WILLIAM STANTON, *Defendants-Appellants.*

**Certificate Denying Leave**

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that the above-named appellants, within the time and in the manner prescribed by section 520 of the Code of Criminal Procedure, duly presented to me applications for certificates that questions of law were involved in the above matters which ought to be reviewed by the Court of Appeals. In such applications, seeking leave to appeal from an order of the Appellate Term, First Department, made after a consolidated appeal of the above matters and entered on or about the 4th day of March, 1965, affirming the convictions of the above-named appellants in the Criminal Court of the City of New York, New York County, it was argued (1) that appellants were deprived of a jury trial in violation of the First and Fourteenth Amendments to the Constitution of the United States; (2) that their convictions were predicated upon evidence procured by unreasonable searches and seizures in violation of their rights under the Fourth and Fourteenth Amendments; (3) that the publications upon which the convictions were predicated were not "obscene" under any constitutionally permitted definition of that term; (4) that section 1141 of the Penal Law, in its proscriptions as to sadistic and masochistic books, is vague and indefinite and violative of the First and Fourteenth Amendments; and (5) that their con-

victions were without proof that the appellants knew of the obscene nature and character of the publications in violation of the First and Fourteenth Amendments to the Constitution of the United States.

After due consideration, and upon the records and proceedings herein, I denied the applications because, in my opinion, no question of law is involved justifying review by the Court of Appeals.

Dated at New York, New York
July 1, 1965

STANLEY H. FULD
*Associate Judge*

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## APPENDIX C

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

PART 2 B

THE PEOPLE OF THE STATE OF NEW YORK,

v.

BERNARD RESHES,

v.

IRVING SCHIFF and HAROLD SHEPERD, ET AL., *Defendants.*

**Opinion on Motion**

WILLIAM E. RINGEL, J. This is a motion to suppress the use of certain evidence, to wit, photographs, books and magazines, upon the trial of these cases, on the ground that they were obtained from these defendants by means of illegal searches and seizures, as well as in contravention of their rights under the First and Fourteenth Amendments. Informations have been filed against all of these defendants charging them with violation of section 1141 of the Penal Law, a misdemeanor. Separate hearings were

held but the cases have been consolidated for the purpose of these motions to suppress, since the fact patterns of each individual arrest are basically similar and the minor variances are without legal significance for the purpose of these motions. This decision will therefore be dispositive of all of them, in accordance with the agreement of all the parties.

The facts at these hearings disclose that pursuant to notice sent to them on April 9, 1963, various police officers were assembled for a special assignment, scheduled to be executed by them on April 10, 1963. They met on April 10, and were shown photographs, some of which purported to be copies of exhibits used in the case of *People* v. *Fried* (18 A D 2d 996), in which a conviction for violation of section 1141 of the Penal Law had been obtained and affirmed, with leave to appeal to the Court of Appeals denied (Fuld, J., March 26, 1963). They were also shown a list of book titles. The police were then divided into small teams and each team was directed to visit one of some 20 book stores in the Times Square area, all visits to be coordinated at 6:00 P.M. on April 10. They were further instructed to attempt to purchase photographs similar to those shown to them (i.e., Fried case photographs), and if they could effect such purchase, and only then, were they to make an arrest. After such arrest, if any, they were to look for copies of the books, the list of which had been shown them at the briefing, seize them and take such other appropriate police action, that they deemed proper.

The officers then visited the shops assigned to them at the time specified and purchased the photographs and books which are the subjects of these motions. After these purchases, they examined them and then placed the various defendants under arrest. Following the arrests, the officers conducted a search of the premises and seized other photographs and books. The admissibility of the materials taken subsequent to the arrests, is not before the court, the People having consented to their suppression.

The shops in question, were public bookshops, open for business at the time of the police visits, and were engaged in the business of selling these items, among others, to the public. The items purchased, were openly displayed for sale, on counters and shelves, where the police observed them prior to purchase.

Mere observation of that which is publicly displayed, does not constitute a search, of any kind, legal or illegal. (*Ellison* v. *United States*, 206 F. 2d 476, 478.) A "search" implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view. (*People* v. *Cattaneo*, 6 111 2d 122; *People* v. *Campanile*, N.Y.L.J., July 1, 1963, p. 6, col. 8, Schweitzer, J. and cases cited.)

Obscene publications are contraband (*Marcus* v. *Search Warrant*, 367 U.S. 717) and they enjoy no special constitutional protection. (*Roth* v. *United States*, 354 U.S. 476; *Alberts* v. *California*, 354 U.S. 476.)

The seizure of contraband in open view is not an unconstitutional seizure. (*People* v. *Cattaneo, supra; People* v. *Defore*, 242 N.Y. 13, 18, dictum; *People* v. *Zucker*, 15 A D 2d 883; *People* v. *Revo*, 18 A D 2d 1053.).

Nor does the purchase of contraband constitute an illegal search and seizure. Entry into premises open to the public, without a warrant, and purchasing contraband therein does not establish "a forceful entry or a refusal to honor constitutional rights of the defendant." Such acts are no "evidence of any search or seizure—legal or illegal." (*Bryant* v. *State*, 106 Ga. App. 642, 643; *People* v. *Fried*, *supra*.)

It is to be noted that in *Zucker* (*supra*) (Record on Appeal, pp. 15, 24) and in *Revo* (*supra*) (Record on Appeal, pp. 18, 19), there were no purchases of the contraband material. The arrests were made after the officer determined that the obscene material was on display for sale to

the public. In *Fried* (*supra*) (Record on Appeal, pp. 10-14, three purchases of obscene material were made on three different dates before the defendant was placed under arrest. In none of these cases, did the police have a search warrant. In affirming *Fried* the court said: "The proof establishes beyond a reasonable doubt the defendant's guilt on the remaining three counts charging that he held out for sale and sold the described photographs and book, which are obscene within the meaning of section 1141. *People* v. *Finkelstein*, 11 N Y 2d 300.)" (Emphasis supplied.)

It would appear from these decisions, *Zucker*, *Revo* and *Fried*, (ibid) that the act of offering for sale, or sale, of obscene material to a police officer, constitutes the commission of a misdemeanor in his presence for which an arrest may be made without a warrant. (Code Crim. Pro. § 177; *People* v. *Moore*, 11 N Y 2d 271.)

The law of arrest is governed by State statutes. (*People* v. *Lombardi*, 239 N.Y.S. 2d 161; *Miller* v. *United States*, 357 U.S. 301; cf. *Ker* v. *California*, 374 U.S. 23.)

From these facts and under the law, it is concluded that there has been no violation of the defendants' constitutional rights under the Fourth Amendment.

Nor can this court discern any violations of the defendants' rights under the First or Fourteenth Amendments. The voluntary sale of alleged obscene material to a person, who turns out to be a police officer, for which sale the seller is arrested and prosecuted, does not constitute suppression of freedom of speech or thought, any more than it constitutes denial of due process. (*Bryant* v. *State*, *supra*.)

Police have their duty to perform and may not close their eyes to contraband lying freely exposed. (*Ellison* v. *United States*, *supra*; *People* v. *Campanile*, *supra*.) Nor are the police required to exchange briefs with a defendant

every time an arrest is made. *Mapp* v. *Ohio* (367 U.S. 645), must not be permitted to degenerate into a shibboleth or into a legal cliche.

The innocence or guilt of the defendants will be determined by the trial court. That determination will depend on proof, beyond a reasonable doubt of the existence of each and every element of the crime charged, including the element of obscenity of the items here sought to be suppressed. (*People* v. *Fried, supra; People* v. *Keohane,* 201 Misc. 597.) The question of obscenity is not one to be decided by the court hearing the suppression motions. This court's function, on passinng on these motions, is solely to determine the admissibility at the trial of the items in question, within the limits prescribed by the Constitution, and as mandated to the States. (*Mapp, supra; Ker, supra.*)

Among the several cases cited by defendants in support of their motions, particular reliance is made on *Stengel* v. *Smith* (18 A D 2d 458 [4th Dept.] and *Marcus* v. *Search Warrant* (*supra*).

Neither of the cases is applicable. As to *Stengel,* a full understanding of that opinion cannot be had without reference to the facts as disclosed in the trial court. (*Stengel* v. *Smith,* 37 Misc. 2d 947.) That trial, in the court below, was a civil suit for an injunction brought against the defendant pursuant to the provisions of section 22-a of the Code of Criminal Procedure. That suit sought to enjoin the sale or distribution of certain publications which were alleged to be obscene, immoral, etc., in certain respects, "or in any other respect defined in section 1141 of the Penal Law." Implicit in the provisions of section 22-a is that there first must be a judicial finding that the material in question is obscene within the purview of section 1141. No such judicial finding was made prior to the commencement of the injunction suit, and the criminal prosecution of the defendant under section 1141 was still pending. Furthermore a motion to suppress "the great majority of the

publications confiscated" had already been granted, in that criminal action.

In the light of these facts, the action of the Appellate Division in vacating the lower court injunction is completely understandable particularly in view of the basic rule pertaining to the seizure of alleged obscene material as set forth in *Marcus* (*supra*).

Stengel presents one other difficulty in interpretation. The Appellate Division in its opinion seems to equate "purchase" with "seizure". On this, defendants lean heavily, but erroneously. That equation must be taken to exist, if it exists at all, only under the facts in Stengel. Furthermore if we are to conclude that the Fourth Department interprets "purchase" as equated with "seizure" as equally applicable in criminal prosecutions under section 1141, we in the First Department cannot accept that ruling. (*People* v. *Revo, supra; People* v. *Zucker, supra; People* v. *Fried, supra.*)

Where there is a conflict in Appellate Division rulings, a court located in this Department must take the law, as enunciated by its own Appellate Division (*Sullivan* v. *Sullivan,* 73 N.Y.S. 2d 547; *Pagan* v. *Mantell,* 3 Misc. 2d 402).

The other cases cited by defendants are likewise not in point. *Manual Enterprises* v. *Day* (370 U.S. 478), involves the power of the Postmaster General to censor what may go through mails. *Bantam Books* v. *Sullivan* (372 U.S. 58) involves the power of a State commission to act as censors, albeit by indirection. *People* v. *O'Neill,* 11 N Y 2d 148, involves the search of a private dwelling.)

One further defense raised by defendants remains to be disposed of. Defendants assert that the prior planning and co-ordinated execution of the plan resulting in the arrest of the defendants was also constitutionally proscribed. This court is not aware of any law or decision

which condemns thoughtfulness and study by the police prior to their embarkation on some proper police activity. On the contrary such prior preparations are to be encouraged. To quote from Gilbert and Sullivan: "take one consideration with another—A policeman's lot is not a happy one!"

And thus, this court, taking "one consideration with another" must conclude that the motions to suppress must be denied as to all the defendants with respect to all of the exhibits, that were purchased. As to all of the other exhibits, the motion is granted.

WILLIAM E. RINGEL

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**Order**

Motions having come on to be heard before me on the 20th day of April, 1963, for Orders directing the suppression of evidence and the return thereof to the defendants pursuant to Section 813-b, of the Code of Criminal Procedure, and for such other and further relief as may be just and proper and incidental to the aforementioned relief, upon the grounds that the aforesaid evidence obtained in violation of the First, Fourth and Fourteenth Amendments of the United States Constitution and after due deliberation having been had thereon and after hearing Ira H. Holley, Esq., Attorney for Defendants, in support of said Motions and Frank S. Hogan, Esq., District Attorney of New York County by Gerald Harris, Esq., Assistant District Attorney, in opposition thereto, and upon reading and filing the Notices of Motion herein dated the 12th day of April, 1963; the affidavit of Bernard Reshes duly verified on the 25th day of April, 1963; the affidavit of Harold Sheperd dated the 23rd day of April, 1963; the affidavit of Herman Bloomberg verified the 25th day of April, 1963; and upon the testimony adduced upon the hearing herein; and upon the stipulation of the parties hereto that all of the said testimony shall apply with same

force and effect to all of the proceedings herein as though the same had been adduced in separate proceedings, and that the opinion of the court should apply with the same force and effect as if separately rendered in each of the proceedings herein.

Now, upon the opinion of the court herein rendered on the 12th day of July, 1963, it is

ORDERED that the said Motion be, and the same hereby is, granted as to all of the evidence seized after the arrests of the defendants herein and it is

FURTHER ORDERED that the said motion be denied as to the evidence acquired prior to the arrests of the defendants and it is

FURTHER ORDERED that the said evidence and materials and other property seized by the Police Department of the City of New York, after the arrest of each defendant, be, and the same hereby are to be returned as follows:

The property seized in premises S84-7 - 7th Avenue, Borough of Manhattan, to be returned to the defendant Bernard Reshes; the property seized from premises 598 - 7th Avenue, Borough of Manhattan, to be returned to either of the defendants Irving Schiff or Harold Sheperd; the property seized in premises 1489 Broadway, Borough of Manhattan, to be returned to either of the defendants Isidore Searles or Fritz Weitmeyer; the property seized in premises 254 West 42nd Street, Borough of Manhattan, to be returned to either of the defendants George Lewis and/or Herman Bloomberg; the property seized in premises 665 - 8th Avenue, Borough of Manhattan, to be returned to the defendant William Stanton; and the District Attorney of New York County, his agents, and the agents of the Police Department of the City of New York, having the same or any of the same in their possession, are hereby authorized and directed to immediately turn over all of the aforesaid material and evidence and other property

seized after the arrest of the defendants, as herein directed, upon receiving a proper receipt therefor; and it is

FURTHER ORDERED that the District Attorney of New York County, be, and he hereby is restrained from using any of the material or evidence or other papers as aforesaid upon the trial of any of these actions, or any information directly or indirectly obtained therefrom or by means thereof, except that material which was acquired before the arrest of the defendants.

WILLIAM E. RINGEL
*Judge of the Criminal Court of the City of New York*

July 23, 1963

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IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~626~~ 26

HAROLD SHEPARD, GEORGE LEWIS and HERMAN BLOOMBERG,

*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

October Term, 1965

No. 626

HAROLD SHEPARD, GEORGE LEWIS and HERMAN BLOOMBERG,
*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

These cases arise from separate judgments of the Criminal Court of the City of New York which were consolidated for purposes of appeal. Petitioner Shepard was convicted on December 11, 1963, for permitting the sale of an obscene book (New York Penal Law §1141), and was sentenced to imprisonment in the New York City Workhouse for thirty days (R. 529).* Petitioners Lewis and Bloomberg were convicted on November 18, 1963, after a joint trial, for selling obscene publications (New York Penal Law §1141). Both defendants were sentenced to sixty days imprisonment in the Workhouse, and, in addition, were fined $500. In case of default of payment, they were to serve an additional thirty days in prison (R. 550).

* References, unless otherwise indicated, are to pages of the trial transcript.

The Appellate Term of the Supreme Court affirmed the judgments of conviction, one judge dissenting (petition, appendix A), and leave to appeal to the New York Court of Appeals was denied by Associate Judge Stanley Fuld on July 1, 1965 (petition, appendix B).

## THE EVIDENCE

### A. *People* v. *Shepard*

**Harvey Gunson**, a New York City detective, testified that on April 10, 1964, he entered a book store called the Liberty Gift Shop where both defendants were employed. After scanning the material offered for sale he made a selection of two books, one entitled *Promenade Bondage, Volume 4* and the other called *The Spanking Nurses* which he took over to the counter where the sales clerk Schiff was standing and said he wanted to purchase them (R. 264, R. 265). Schiff took the books and placed them in a paper bag (R. 271). While at the counter making the purchase, Gunson noticed books, their pages opened to photographic material, and photographs displayed on the racks behind the cash register (R. 264). Gesturing to these displayed books and photographs, Gunson said he would like to purchase one of them also. Schiff then removed a fresh copy of one of the displayed booklets from a drawer behind the counter. Gunson then asked, pointing to a picture displayed on the rack, "Are they all as good as that picture?", and Schiff replied "they are all as good" (R. 265, R. 266). Schiff then handed Gunson the booklet of pictures, entitled *Exotic Center, a Photo Publication,* which contained one of the photographs which was displayed on the rack behind

the cash register, took the two books which Gunson had selected from the shelves, and placed all these articles in a bag, and charged the price of $4.75 (R. 266-7, R. 270). At the time when Gunson was making the purchase, defendant Shepard was standing behind the counter next to Schiff. Promptly after making the purchase Gunson and his partner, Detective Cassoveri, placed Schiff and Shepard under arrest (R. 273, R. 274). Shepard, who was questioned as to his capacity at the store, replied that he was the manager of the store.

### B. *People* v. *Lewis and Bloomberg*

**Alvin Jones**, a detective, testified that he entered the book store where defendants worked on April 10, 1963. Observing in a wooden rack near the front of the store about 300 packets of photographs, cellophane wrapped and displaying a photograph on the front and one on the back of the packet (R. 407-8), Jones selected two packets and gave them to defendant Lewis, asking him if these were the only photographs which he had. Lewis replied, "They are all the same—the best we have got." Lewis was paid two dollars for the pictures and he placed them in a bag and handed it to Jones (R. 412). After making this purchase, Jones continued to look around the store and finally made a selection of two books entitled *Spanking Sisters* and *Bondage—Annual No. 1* which he took over to defendant Bloomberg asking "Are these books any good?", Bloomberg answered, "Well, I have got some better if you can read French." Jones conceded that he could not read French and asked the price of the two books. Bloomberg replied that the price was five dollars and he called over to Lewis, "Give them to him for $2.50 each" (R. 415). Jones

then took the books over to Lewis to whom he paid that price. Upon making this second purchase, Jones identified himself and placed Bloomberg and Lewis under arrest (R. 416).

## POINT I

**Four of the questions presented are to be considered by this Court in *Mishkin* v. *New York*, October Term, 1965, No. 49. The fifth question, whether a jury trial is constitutionally required in obscenity cases, has been raised on petition for certiorari in *Friedman* v. *New York*, October Term, 1965, No. 1161.**

The petition for certiorari raises five questions for consideration by this Court, four of which are presently awaiting argument in No. 49, *Mishkin* v. *New York*. The fifth issue, whether a jury trial is required in obscenity cases, has been raised and is awaiting determination on a certiorari petition in No. 1161, *Friedman* v. *New York*.

**Concerning the question of obscenity**

The exhibits involved in the present case are of the "bondage" or sado-masochistic type. Shepard was convicted for permitting the sale of two books, *Promenade Bondage, Volume 4* and *The Spanking Nurses*. Lewis and Bloomberg were convicted for selling two packets of photographs and a book, *Bondage Annual No. 1*. These publications are of the same type as those presently before this Court in *Mishkin* v. *New York*, and the offending characteristics of such material is dealt with at length in Point I of appellee's brief in *Mishkin*.

**Concerning the vagueness of the statute**

With respect to this material, petitioners also claim that the conviction must be reversed because the words "sadistic" and "masochistic" in the New York statute are unconstitutionally vague. This question is also presented in *Mishkin* v. *New York* (see appellee's brief, Point II).

**Concerning scienter**

An issue is also raised in the present petition as to the mental element of scienter required in obscenity prosecutions. It is argued here, as in *Mishkin*, that a defendant must know the books are obscene. This point is fully treated in Point IV of appellee's brief in *Mishkin*.

While the evidence of knowledge in each case differs, the proof in the present case establishes that the defendants knew the contents of the material sold. Lewis when asked about the two packets of photographs, told the officer "they are all the same—the best we have got" (R. 412). Bloomberg, when asked whether the bondage books selected by the officer were "any good," replied, "Well, I have got some better if you can read French" (R. 415). Both remarks indicate clearly a comparison with other material in the store, and could not have been made unless Lewis and Bloomberg knew the contents of their stock generally, and the purchased material specifically. Shepard, while not orally expressing any opinions as to the material, was nevertheless the manager of the store in which numerous publications of this type were openly displayed. He could not have avoided knowledge of their contents, nor can he

be permitted to "insulate himself against knowledge of an offending book" [*Smith* v. *California*, 361 U. S. 147, 161 (1959)].

**Concerning the gathering of the evidence**

Petitioners further claim that the failure to hold a prior adversary hearing as to obscenity invalidates the use on trial of evidence purchased by the police. The same issue is considered in Point V of appellee's brief in *Mishkin*.

**Concerning the requirement of a jury trial**

The issue of whether a jury trial is required in obscenity prosecutions has been raised in *Friedman* v. *New York*, and is treated in Point II of respondent's brief in No. 1161.

## Conclusion

Because of the virtually total identity of issues raised in the petition and in *Mishkin* v. *New York*, respondent agrees with petitioners that "it would be appropriate to withhold action on this petition until the *Mishkin* case is adjudicated by this Court" (petition, p. 21).

Respectfully submitted,

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November, 1965

FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~626~~ 26

HAROLD SHEPERD, GEORGE LEWIS and HERMAN BLOOMBERG, *Petitioners,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Department

## PETITIONER'S REPLY BRIEF

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March 29, 1966.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 626

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HAROLD SHEPERD, GEORGE LEWIS and HERMAN BLOOMBERG, *Petitioners,*

v.

PEOPLE OF THE STATE OF NEW YORK

---

**On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Department**

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## PETITIONER'S REPLY BRIEF

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Now that the *Ginzburg, Mishkin* and *Fanny Hill* cases have been decided, the questions presented by the Petition for a Writ of Certiorari herein need to be reassessed. Some of those questions have been resolved, particularly by the *Mishkin* decision. But others have

not, and their importance is such as to justify the granting of the Petition to adjudicate the recurring and difficult problems encompassed by those questions.

**1. The Questions That Have Been Resolved by the Mishkin Decision.**

The first two questions presented in the Petition for a Writ of Certiorari have been decided by the *Mishkin* opinion of the Court and thus are not appropriate for further consideration at this time. Those two questions relate (1) to the alleged vagueness of the "sadistic" and "masochistic" references in § 1141 of the New York Penal Law and (2) to the problem whether the type of publications involved can be considered obscene under any permissible or constitutional standard.

But the remaining three questions presented herein have in no way been resolved by the Court's actions in the *Ginzburg, Mishkin* or *Fanny Hill* cases. If anything, the appropriateness and need for full consideration of these three remaining questions have been augmented by those decisions.

**2. The Question Whether Petitioners Have an Absolute Constitutional Right to a Jury Determination of the Obscenity Issues.**

The Third Question presented in the Petition is whether the instant convictions "can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a trial and a determination by a jury of the alleged obscene, sadistic or masochistic nature of the book." That is a question unresolved by the recent Court decisions and that is a question now pending before this Court in the Petition in *Friedman* v. *New York*, No. 135, Oct. Term 1965.

The substantiality of this issue has been shown in the Petition (see pp. 24-25) by reference to the statements of Mr. Justice Brennan in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 448, and to those of Mr. Chief Justice Warren in *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 68-69, and in *Jacobellis* v. *Ohio,* 378 U.S. 184, 201 (joined by Mr. Justice Clark). And to those statements must be added the sentiments of Mr. Justice Stewart, uttered as a Circuit Judge in *Volanski* v. *United States,* 246 F. 2d 842, 845 (C.A. 6), wherein an obscenity conviction was reversed and remanded for a new trial "preferably by a jury"—since a jury in obscenity matters "most nearly satisfies the moral demands of the community" and can determine "the average conscience of the time." See full quotation in Petitioner's Reply Brief (p. 3) in *Friedman* v. *New York,* No. 135, Oct. Term 1965.

The significance of the right to a jury trial in obscenity matters is augmented to the extent that obscenity may now be said to depend upon "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7). The degree and relevance of such particular "circumstances" are matters commonly within the ambit of jury competence, and as the *Ginzburg* doctrine of commercialized obscenity becomes more prevalent it becomes essential to know if there is a constitutional right to a jury determination of such matters.

It should be noted, finally, that the question of the federal constitutional right to a jury trial in obscenity misdemeanor prosecutions was promptly and properly raised at all stages of the proceedings below. No question is raised by the respondent as to petitioners' right to pursue this claim at this juncture. And in

view of the importance of the claim, the issue deserves full exploration by this Court.

**3. The Question Whether the Convictions Are Constitutionally Invalid in the Absence of Any Allegation or Direct Proof of Scienter With Respect to Obscenity.**

The Fourth Question presented by the Petition herein is whether the convictions of the petitioners "can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of allegation in the information as to knowledge or scienter as to the character of the book sold and in the absence of direct proof thereof or any definitive standard as to the degree of proof required."

While the *Mishkin* opinion dealt with the scienter problem, it did so only within the limits of the particular facts of that case. And those facts are critically different from those involved here. Mishkin himself was the active progenitor of, and participant in, a complex writing, publishing and selling enterprise, and scienter was found to have been established, after an extensive trial, by proof of "appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books." Slip opinion, pp. 9-10.

The facts in the instant cases could not be more significantly different. These petitioners were not the authors, the master minds, the distributors or the

publishers of the material in question. Petitioner Sheperd was simply the manager of a book store who took no part whatever in the actual sale of the books found to be obscene; there was no evidence that he even knew the transaction was taking place, much less that he knew or should have known of the obscene nature of the books. In short, Sheperd was convicted solely on proof that he was the manager of a book store wherein alleged obscene books were sold or offered for sale.

The proofs as to petitioners Lewis and Bloomberg were equally sparse. As clerks in a bookstore, they sold certain books and photographs later found to be obscene. While Bloomberg engaged in a bit of "puffing" of the material, neither was shown to have read or been aware of the nature of the particular items in question.

These cases thus bring into question the exact counterpart of the *Mishkin* scienter situation. Whereas *Mishkin* establishes one kind of proof of scienter necessary as to a publisher-distributor, what is the kind of scienter proof necessary as to a mere manager or clerk of a book store who has not been shown to have read or even to be in a position to know the contents of the publications? Here, then, as in the Petition pending in *Keney* v. *New York,* No. 39, Oct. Term 1965, a sharply substantial question is raised that affects all book store personnel in the country who work in stores that may have on their shelves materials found to be obscene. What must they do to protect themselves? What actions or inactions on their part will support a finding of scienter? Must they make themselves aware of the contents of all items offered for sale? These questions deserve most careful consideration by this

Court; and until they are answered, the book store business must be conducted on a most perilous basis.

Moreover, the instant Petition raises one aspect of the scienter problem which was expressly excepted from the *Mishkin* ruling. The Court's opinion, p. 9, fn. 11, noted that "The § 1141 counts [in the *Mishkin* case] did not allege appellant's knowledge of the character of the books, but appellant has not argued, below or here, that this omission renders the information constitutionally inadequate."

But the petitioners here urge precisely that point. At the trial court level, at the appellate level and in this Court (see Third Question presented), petitioners have argued that the informations were constitutionally defective in that they alleged only that petitioners "unlawfully" sold obscene publications, there being no allegation that they "knowingly" sold such publications. See discussion in Petition, pp. 30-31. The fact that the *Mishkin* opinion took pains to segregate out this point as to the adequacy of the information suggests that the issue is one of substance, warranting review by this Court.

**4. The Question Whether the Convictions Can be Sustained Where Evidence Was Obtained Pursuant to a Massive Search and Seizure Plan Without Prior Judicial Authorization.**

The Fifth Question presented by the Petition deals with the constitutional validity of the convictions, predicated as they were on evidence procured by a massive search and seizure scheme lacking prior judicial authorization. Respondent's only comment (Opposition Brief, p. 6) on this question was to seek to identify the issue with one then pending in *Mishkin* and to refer the Court to its *Mishkin* brief on the merits.

But this Court in *Mishkin* found that the record was inadequate with respect to the search and seizure point and declined to resolve the question there raised. No such defect is here present. A full hearing was held with respect to the search and seizure question and the Criminal Court rendered a seven-page opinion relative to the constitutional validity of the scheme. See Pet. App. 5a-11a.

Thus the search and seizure question raised in the Petition remains ripe and appropriate for the Court's consideration. For the reasons expressed in the Petition, pp. 31-34, the question should be explored by this Court. And see a somewhat similar search and seizure problem raised in the pending Petition in *Avansino* v. *New York,* No. 1008, Oct. Term 1965.

## CONCLUSION

For these various reasons, in addition to those expressed in the Petition, certiorari should be granted as to all but the first two questions presented in the Petition.

Respectfully submitted,

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March 29, 1966.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SHEPERD ET AL. *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE ~~DIVISION~~ TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 26. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate ~~Division~~ TERM of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE and MR. JUSTICE CLARK would affirm. *Mishkin* v. *New York*, 383 U. S. 502.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.